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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 939.

OVERNIGHT MOTOR TRANSPORTATION COMPANY, INC.,
Petitioner,

v.

WILLIAM H. MISSEL, *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit

BRIEF OF
AMERICAN TRUCKING ASSOCIATIONS, INC., AMICUS CURIAE

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Washington, D. C.
March 31, 1942.

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INTRODUCTION

Consent of the parties having first been obtained and duly filed with the Clerk, the American Trucking Associations, Inc., submits this brief as *Amicus Curiae.*

The American Trucking Associations, Inc., is the national trade association of the for-hire carriers of property in the motor transportation industry. It appeared on behalf of the industry before the Congressional Committees, represented the industry in connection with these issues, in all

proceedings before the Interstate Commerce Commission, and was party to the principal litigation before the courts involving the Fair Labor Standards Act and the jurisdiction of the Interstate Commerce Commission.

This case concerns the interpretation of the Fair Labor Standards Act (29 U. S. C. A. 201, *et seq*), particularly Sec. 7 covering minimum wages for overtime. Construction of the statute involves ascertainment of the intent of Congress. The precise question is whether the classes of employees and wage earners covered by Sec. 7 are co-extensive with, and limited to, those protected by Sec. 6 covering straight time minimum wages, or whether Sec. 7 covers all classes of employees and all wages, regardless of the limitations in Sec. 6.

Other issues concern construction of wage agreements and consideration of administrative procedure and prior litigation. As the administrative procedure and litigation were handled by the American Trucking Associations, Inc., on behalf of the industry as a whole and as representative of a class, it appeared to be appropriate that the Association participate in this case as *Amicus Curiae*.

POINTS AND SPECIFICATION OF ERRORS

The points and assignment of errors as set forth in the brief of Petitioner (Overnight Motor Transportation Co., Inc.) are adopted for the purposes of this brief and are repeated with comments for convenient reference.

I

The scope of Section 7 (maximum hours) is limited, and is restricted to the classes of employees covered by Section 6 (minimum wages). This interpretation is consistent with the provisions of the Act and is supported by the legislative history of the Act.

Specification of Errors: The Court below erred in holding that the scope of Section 7 (maximum hours) was un-

limited, and was not restricted to the classes of employees covered by Section 6 (minimum wages).

The Court erred in adopting a construction of the Act which is at variance with the intent of Congress.

Comment: This point is applicable to all industries covered by the Act.

II

The private right of contract is not destroyed by the Act, but is merely restricted by a minimum wage floor below which employer and employee may not contract. Petitioner is entitled to the usual and ordinary presumption that the parties contemplated compliance with the law in their over-all contract.

Specification of Errors: The Court below erred in holding that the Act destroyed the private right of contract, instead of construing the Act as having the effect of placing a minimum wage floor below which employer and employee may not contract.

The Court also erred in applying a novel legal presumption that the total contract wage was not intended to, and did not, include overtime pay at a penalty rate, thereby rejecting the usual and ordinary presumption that parties contemplate compliance with the law in their over-all contract.

Comment: This point is applicable to all industries, but is particularly important to this transportation industry because its competitors are exempt from the overtime wage provisions and because the nature of its operations, like all other transportation industries, necessitates a large percentage of guaranteed weekly or monthly income for indefinite hours.

III

The double penalty provisions of Section 16, and the overtime pay provisions of Section 7 in the nature of a penalty, are discretionary with and not mandatory upon the courts in cases of good faith litigation, and a ruling that they are mandatory deprives Petitioner of the protection of the "due process" provisions of the Constitution.

Specification of Errors: The Court below erred in ruling that the double penalty provisions in Section 16 were mandatory upon and not discretionary with the courts. The Court also erred in disregarding Petitioner's contention that the overtime rates provided by Section 7 were in the nature of a penalty. The imposition of these penalties, regardless of the fact of good faith litigation, deprived Petitioner of the protection of the "due process" provisions of the Constitution.

Comment: This point is applicable to all industries subject to the Act but is particularly important to this industry because it is the only industry subject to the dual jurisdiction of separate governmental agencies, and the infliction of penalties which arise because of conflicting administrative jurisdiction is repugnant to "due process" of law.

IV

The Act imposes a legislative function to be performed by the Interstate Commerce Commission for the purpose of implementing the scope of Section 7, and prior determination of facts by the Commission is a prerequisite, under the primary-jurisdiction rule, to action by the courts.

Specification of Errors: The Court below erred in failing to determine the issues which were duly raised in the pleadings, and argued, with respect to the legislative function imposed by the Act upon the Interstate Commerce Commission by reason of Sec. 13(b), which was prerequisite in determining the scope of Sec. 7 and which implemented that section. The Court erred in ignoring the fact

that during the period involved in this suit the prerequisite determination by the Commission under the primary-jurisdiction rule had not been made.

Comment: This point applies exclusively to this transportation industry because it is the only industry subject to jurisdiction divided between two governmental agencies; it is the only industry with respect to which part of its general employees are subject to the overtime wage provisions and part are exempt; and, it is the only industry dependent upon action by an independent agency to determine first the classes of employees which affect safety, which, in turn, implements the Fair Labor Standards Act and fixes the coverage of the overtime wage provisions. The decision of the Court of Appeals appears to allow the recovery of both penalty wages and penalty damages, retroactively, over a period of years, during which time, the industry was helpless with respect to determining the coverage of the law.

STATEMENT OF THE CASE

The factual statement of this case as it involves the particular employer and employee, was set out in full in the brief of Petitioner, Overnight Motor Transportation Company, Inc. As this is a brief on behalf of the industry generally, it is desirable to summarize and re-state the case to reflect the facts and issues as they bear upon large classes of employees and the national importance of the questions. We are not unmindful of the need for respect for the Record, but to the extent that undisputed matters of general importance are necessary to illustrate the setting of the questions, we have ventured to supply them.

These factual statements relate to all of the questions in the case. In stating the facts and in making the arguments, we have not lost sight of the distinction between that which may be addressed to this Court and that which should be addressed to Congress. Our purpose is solely to supply the facts which breathe life into the dead words of the law which is now before the Court for construction.

Fact No. 1: The employee (Respondent), like many thousands of other employees of the industry, was paid on a lump sum weekly basis and the lump sum salary exceeded the minimum wage for straight time prescribed by Sec. 6, and also exceeded one and one-half times the Sec. 6 straight time minimum wage for all overtime hours worked or on duty under Sec. 7.

Fact No. 2: The employee (Respondent), like many thousands of similar employees in the industry, was employed for an indefinite number of hours to accomplish certain results which were necessary in the relations of a common carrier with the public.

Fact No. 3: The agreement and working arrangements represented a custom and necessity which existed because of the nature of the operations and the character of the service rendered to the public by the industry. The employee made his own determination with respect to responsibilities which involved overtime as reflected in varying number of hours worked or on duty or responsibility for work. (The duties of "white collar" terminal men are stated in the argument.)

Fact No. 4: During the period covered by this suit, no question was ever raised by either employer or employee with respect to voluntary adjustment of the contract or reformation of the contract by operation of law; for the reasons that, first the contract appeared to meet the wage requirements of the law; and, second, the nature of the employment did not lend itself to a mathematical breakdown between hours worked, hours on duty, and hours responsible for results.

Fact No. 5: The weekly or monthly employment agreement provided an aggregate amount in excess of statutory minimum wages and in excess of overtime computed on that basis, and theoretically it could have been fictitiously re-stated on the basis of minimum straight time wages and minimum overtime wages prescribed by the statute. There-

fore, the issues respecting contract were matters of *form* and *not of substance*. But these employment arrangements were not re-stated because that would have destroyed the certainty of income for the employee and might have resulted in lower aggregate compensation, and would have involved the impractical problem of distinguishing between hours worked, hours on duty and hours responsible for results.

The period covered by employee's (Respondent's) claims was the identical period during which the industry was pursuing diligently every administrative and legal means to have the issues determined and the Interstate Commerce Commission was holding many hearings in connection with the subject and for the purpose of implementing the law.

Fact No. 6: The duties of the employee (Respondent), like many thousands of other employees of the industry, were, to a large extent, of the kind usually performed by administrative employees and minor executives, and if he was an administrative employee or executive, he was exempt under Section 13(a) from both the minimum wage and maximum hour provisions of the Fair Labor Standards Act. These employees have many duties related to safety and are required to comply with many safety regulations issued by the Interstate Commerce Commission, and the legal effect of such duties was undetermined during the period of employment of this particular employee. (Explained in the argument.)

Fact No. 7: The operating ratio (expenses to gross income) of the industry is approximately 95 and approximately 50 per cent of the expense is represented by labor costs, and, in view of the regulation of charges by public authority, as well as by competitive considerations, it is not possible to resolve all doubtful issues respecting interpretations of the Fair Labor Standards Act and the classes of employees possibly involved, by making voluntary payments.

This public service industry could not increase its charges to the public in anticipation of a contingent liability and it could not rebate charges it collected in the event the liability did not materialize. Neither could it pay employees and then recover from them on the theory of mistake of law.

There is no provision in the law for the placing of funds in escrow and such action would not have been effective to foreclose either employee suits or the imposition of penalties.

Fact No. 8: The principal American Federation of Labor union with which this industry has many employment agreements has not accepted and adopted the views and informal interpretations of the Administrator of the Fair Labor Standards Act and many of the existing agreements with it which are binding contracts on this industry are inconsistent with the Administrator's views in connection with many classes of employees.

Fact No. 9: The industry knew that when this legislation was being considered by Congress it appeared before Congressional Committees and while never asking for exemption, it did ask that the bill be amended to accord it equal treatment with its competitors. Its competitors were exempted from the overtime provisions, and amendments were made, the literal terms of which did accord equality of treatment to this industry and would have exempted it from the overtime wage provisions, and it was not until this Court decided the case of *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534, that the industry became aware of a different result.

ARGUMENT

I

The Scope of Section 7 (Maximum Hours) is Limited, and is Restricted to the Classes of Employees Covered by Section 6 (Minimum Wages). This Interpretation is Consistent With the Provisions of the Act and is Supported by the Legislative History of the Act.

At the outset it should be emphasized that this case arises, not because the employer paid less than the minimum wage provided by Section 6, or because the employer paid less for overtime under Section 7, than one and one-half times the minimum wages prescribed by Section 6, but solely because the employer paid a lump sum wage which was more than minimum wages under Section 6 and more than one and one-half times the Section 6 minimum wage for overtime under Section 7. Therefore, we have the anomalous situation of a judgment for wages and penalties for having paid more than was was necessary.

The construction contended for by Respondent has the quality of converting statutory provisions which are clearly beneficial to a large group of poorly paid employees, into an instrument of oppression for those same employees. The statute, Section 6, fixes minimum wages and no one should contend for construction that necessarily tends to discourage the payment of better wages. Respondent's position is, that if the employer pays better than the minimum wages provided by Sec. 6, the employer must be penalized under Sec. 7 in direct proportion to any voluntary increases in wages over those provided in Sec. 6. Certainly such a construction would tend to discourage an employer from paying in excess of the minimum wages and operate to reduce the total earnings of the employee.

When Congress considered this legislation, it was clear that the worst substandard wages and living conditions were the only objects of the law. Those substandard conditions did not prevail among the organized workers whose

straight time and overtime were arrived at through collective bargaining. Those conditions were not found among the white collar workers who possessed a considerable degree of individual bargaining power, regardless of organization. The evil which Congress struck at affected the worker with practically no bargaining power. Congress knew that there were two or more such workers for every job and that their competition for employment forced wages, in many places and in many industries, to substandard levels, and thereby burdened interstate commerce.

Respondent contends that Congress intended to compel all employers to pay overtime wages at penalty rates, regardless of the salary or hourly rate of pay. It is argued that Congress wanted to establish a universal 40-hour week and believed that anything over 40 hours was a substandard work week and should be discouraged through the device of penalty wages. That may possibly be an ideal social objective which Congress may consider some day, but the objective presented by this case is, what did Congress do in this initial social act, not what Congress might have done, assuming the absence of constitutional questions.

Congress did not deal with ideal social objectives. It took a limited initial step in the field of social considerations and did that under the commerce clause to remove burdens on interstate commerce. There is a long gap between burdens on commerce arising from competition at substandard wages and diminution of purchasing power on the part of some millions of employees benefited by Sec. 6, and any burden on commerce, actual or imaginary, arising from highly paid employees working over 40 hours per week.

It is argued that the 40-hour week theory is not only desirable as a social objective but that it is desirable as a means of spreading employment, regardless of class or salary. Again, the objective here is not speculation as to the bases upon which Congress might have acted, but is strictly limited to a determination of the extent to which Congress did act.

It may be that penalty wages have a tendency to spread employment as well as raise pay. Both objectives could be accomplished and benefit the classes of employees who are aided and protected by Sec. 6. Congress could, and we think did, limit the coverage of Sec. 7 the same as it limited the coverage of Sec. 6.

The history of this legislation discloses some trace or color of suggestion that broad and sweeping provisions should be adopted by Congress. No doubt, these were considered but the final legislation represented many compromises. The Conference bill, together with the Committee reports and the debates, disclosed strict adherence to those views which, throughout the consideration of the subject, advocated limited action for specific and limited purposes.

The abandonment of a Board with broad legislative powers in favor of an Administrator with narrow administrative powers, is indicative of the intent to write a limited law which only required limited administration and a minimum of discretion.

Congress well knew of the various and varying industry problems with which a Board would have been required to deal in a discretionary way in fixing wages and hours if the law was to have broad application. The compromise made was to limit the law so as to require only minor administrative regulations. Our theory of this case is consistent with a limited law and limited administration. Respondent's theory of a broad law with narrow administrative procedure is inconsistent with the known economics of industry and the nation.

Congressional Intent

Congress had in mind helping the underprivileged, and at the time everybody thought so and said so. If Congress had in mind going beyond those limited objectives and to reach ideal social objectives, we would expect to find something in the record in support of the proposition. The repeated references to the underprivileged and the burdens on interstate commerce incident to the exploitation of the un-

der-privileged, and the total absence of anything in the legislative history indicating any other purpose, certainly should be persuasive of the intention of Congress.

Many references and quotations from the Congressional debates were made in Petitioner's brief and we will avoid general repetition here.

Certain additional excerpts from the Committee hearings and Committee reports are so strongly persuasive of the limited purpose of the bill that we quote them.

The hearings on S. 2475 and H. R. 7200 were conducted by a joint Committee. The legislative history of this law involved consideration of many problems and varying provisions of different bills. Some of these proposals contemplated regional differentials in wages and varying minimum wages. Some of the original provisions contemplated a Board with broad powers to fix wages and hours and to grant exemptions. The fact that the final bill does not give to the Administrator the power to determine exemptions regardless of the nature of the industry or the duties of the employee is persuasive of limitations in the classes of employees covered. Regardless of the variations in details, there was never any variation in the clearly stated objectives to deal only in a limited way with the matter of wages and hours and to extend the protection of the law only to those groups of employees who were regarded as underprivileged and defenseless.

Legislative History

On June 2-5, 1937, the Honorable Robert H. Jackson, appeared before the Committee, and his testimony is reported in Part I of the Committee hearings on S. 2475 and H. R. 7200. At page 30, Representative Wood referred to a situation where wages of from $3 to $4 per day had already been established by agreement in different cities. In reply, Mr Jackson said:

> "Your illustration is so far above the minimums which the Board is permitted to deal with that the situation would not be affected, because the purpose of

the minimum-wage bill is not to help the man who already has been able, by collective bargaining, to establish a fair wage."

Representative Dunn:

"I understood you to say awhile ago that the Board would establish different minimums in a given industry in different localities. Did you not say that?"

Mr. Jackson:

"That is right; but what I am pointing out to you is that your illustration will not be affected at all * * *. In other words, the dealing with the minimum wage does not deal with the people getting wages in the higher brackets."

Page 33. Senator Walsh:

"The trades that he speaks of, the well-paid craftsmen, would have no application. There is no question of wages at all unless the annual income to the worker is less than $1,200."

Mr. Jackson:

"That is right."

Representative Conley:

"That satisfies my question."

Page 38. Representative Connery:

"* * * Do you believe under this $1,200 provision, is it not the idea of the legislation to take care of the poorest paid workers in the United States, in fact, those whom labor has not been able to reach or to organize? A man getting $6 a week working 60 hours a week. Is not the idea of this legislation to bring them up to something like $16 a week, and then come up to the maximum of $1,200 a year, and then leave it to labor to build up from $1,200 on?"

Mr. Jackson:

> "That is the purpose, of course, to maintain the fair wage, to establish the floor above which labor may build."

Page 39. Mr. Jackson:

> "* * * The whole purpose of the bill is to elevate the floor, so to speak, below which wages must not go. Certainly there is no purpose here to nullify the effects of collective bargaining where that has resulted in a better than minimum fair wage for workmen."

Mr. Jackson stated the purposes and limitations of the law as understood by everybody that had anything to do with enactment of the law. The first Administrator, Mr. Andrews, understood and stated the purposes of the law when he addressed the Southern States Industrial Council at Birmingham, Ala., on September 29, 1938. During an open forum discussion following his speech, the former Wage-Hour Administrator was asked this question:

> "Many clerical and nonsupervisory employees are on a monthly or weekly-wage basis. It is necessary for such wages to be recalculated to an hourly-wage basis and time and one-half paid for hours over 44?"

The Administrator answered:

> "* * * Clerical forces, we all feel, are included in the Act. But I cannot see where there is going to be any practical difficulty there because your clerical force in any plant of any consequence certainly is earning on a basis of more than 25 cents an hour weekly wages divided by the hours they work. If they are well above 25 cents an hour, it seems to me that there would not be much question about time and a half for overtime, because *you could figure in that weekly wage that time and a half over the 44 hours had been given consideration as remuneration for their full week's work.*" (Reported in October 24, 1938, issue of the Labor Relations Reporter, and again referred to in 3 Wage and Hour Reporter 228.)

On June 7-15, 1937, Mr. John L. Lewis appeared before the joint committee and his testimony is reported in part II of the committee hearings. At page 281, Mr. Lewis strongly opposed giving the proposed board any authority whatever over any wage above the minimum prescribed and said:

> "Their power should be restricted to making those standards come up to the minimum standards declared necessary by Congress. * * * I think the power of the board should be limited to cases which run below the level of the standards fixed by Congress. I see endless confusion in the adoption of Section 5 now. I see a drift toward the complete fixation of wages in all industry by governmental action."

At page 303, Mr. Lewis said:

> "I do not think it is well to build up a tariff atmosphere around this bill, because it is essentially an economic wage bill that has to do with increasing the living standards of people who now have subnormal compensation * * *."

One of the proposals provided:

> "Maximum Hours
>
> "No employee is to be deemed to be employed in violation of this section if he receives additional compensation for his overtime employment at the rate of one and one-half times the regular hourly rate at which he is employed, or times the rate applicable under or pursuant to the act, *whichever is higher*". (Cong. Rec. Vol. 83, p. 9252)

Mr. Lewis didn't want overtime for the employees making more than minimum wages, regulated by Congress. Congress heeded labor's objections to having its field invaded and revised Sec. 5, now renumbered Sec. 7, by striking out the words "whichever is higher". Had the language of original Section 5 been adopted, it would have been perfectly clear that the payment of overtime at penalty rates ran to every class of employee regardless of salary and

regardless of union agreements. Mr. Lewis objected to that. The Conferees adopted a provision requiring payment of one and one-half times "the regular rate at which he is employed".

The only possible purpose of changing the language of Section 5 was to limit its application to the regular rates to which an employee is entitled under Section 6. There are no other regular rates in existence. All other rates are highly irregular, depending upon sections of the country, classes of employment and the bargaining power of particular employers and employees. Congress could hardly have expected to cure an evil, if any, by making its requirements contingent upon irregular and inconsistent private contracts.

Labor objected to the invasion of its field in the higher brackets and a change was made in the bill. This change not only met the objections of labor but squared it with the purpose of limiting the legislation in its entirety to those poorly paid and helpless classes of employees.

At page 950, Mr. Sidney Hillman said:

> "Well, of course. I do not believe, as I understand it, that the purpose of the bill is to establish anything other than minima."

It is certainly clear that organized labor did not want Congress to invade the field covered by organized labor. Labor was willing to have a minimum wage floor fixed by Congress, but it wanted it clearly understood that the unions were to be free to organize employees, negotiate contracts and establish wages above the minimums. The establishment of overtime wage provisions has always been as much a part of the field of organized labor as the establishment of wages for straight time.

House Committee print of S. 2475, dated December 11, 1937, proposed to provide for overtime at penalty rates for night work only, and limited the overtime rate to one and one-half times the *statutory straight time* minimum rate:

"* * * That for the purpose of maintaining the health, efficiency, and general well-being of the employees affected, it is the declared policy of this Act to discourage employment of persons between the hours of midnight and 6 o'clock antemeridian in those industries or occupations which do not require continuous process operation, and persons employed in such industries or occupations between the hours of midnight and 6 o'clock antemeridian shall be paid a rate of not less than one and one-half times the rate established pursuant to subsection (b) of this section."

House Report No. 2182, 75th Congress, Third Session, April 21, 1938 (to accompany S. 2475). Page 6:

"The federal government cannot and should not attempt to regulate the wages of all wage earners throughout the United States."

Congress seems to have recognized some limitations on its power. If Congress did recognize a limitation on its power with respect to straight time minimum wages, certainly the same limitations would apply to overtime minimum wages. The limitations, if there be any, must relate to the effect on commerce. Congress might exercise its power to help the lowest classes because their conditions burden commerce and result in unfair competition in commerce, but similar results do not flow from either the wages or hours of the better paid employees. Congress did not think so, and to repeat, the observations of Mrs. Norton, "if it had, it would have said something about them."

House Report No. 1452, Union Calendar No. 535, 75th Congress, 1st Session, August 6, 1937. Page 9:

"It only attempts in a modest way to raise the wages of the most poorly paid workers and to reduce the hours of those most overworked."

Page 15:

"Subsection (a) introduces flexibility in the regulation of hours by authorizing employment for more

hours per week than the applicable maximum upon condition that payment for such overtime is made at one and one-half times the regular rate."

Senate Report No. 884, 75th Cong., 1st Sess., July 6, 1937., Page 3:

"It is not intended that this law shall invade the right of employer and employee to fix *their own contracts of employment*, wherever there can be any real, genuine bargaining between them. It is only those low-wage and long-working-hour industrial workers who are the helpless victims of their own bargaining weakness, that this bill seeks to assist to obtain a minimum wage."

Page 8:

"And the policy is declared that orders relating to wages shall affect only those employees who need legislative protection and shall not interfere with the processes by which higher wages are secured."

Page 9:

"Section 18 provides for the payment of reparation to employees who have been paid lower wages or who have been employed for longer hours than the applicable standards allow. In the case of wages this reparation amounts to the difference between the wage received and that which should have been paid. In the case of hours, additional compensation is required for the overtime (where the act requires overtime) at the rate of one and one-half times the regular wage."

The foregoing references to committee hearings disclose the purposes of those who proposed Congressional action. The legislative road was long and tortuous and many proposals were considered. The final Conference agreement followed the idea of helping the needy only.

Conference Report No. 2738, 75th Congress, Third Session, June 11, 1938. At page 21, Mrs. Norton pointed out:

"Now the declared policy of Congress is to remove certain bad labor and industry conditions, and to do

that Congress put an absolute ceiling on statutory wages and a ceiling on what an industry committee could do. That ceiling was 40c. Certainly, there was no intention of tampering with anything higher than the statutory minimum, or the industry committee minimum. Congress did not find that those higher wage levels inflicted the bad conditions it struck out against in its declaration of policy. If it had, it would have said something about them."

Congress certainly would have been "tampering" with wages above the statutory minimums if Section 7 is to be construed as forcing the payment of penalty rates for overtime in connection with wages above the minimum and regardless of amount. If, as Mrs. Norton pointed out, there was nothing in the declaration of policy to indicate that higher wages resulted in bad conditions, it is equally true that there is nothing in the Congressional findings to indicate that it was necessary to impose penalty overtime wages without regard to classes of employees and without regard to their salary.

In the debates on the Conference bill, it was made clear that the Conferees dealt only with conditions relating to the law-wage group:

Mr. Welch, one of the Conferees:

"When you stop to consider the thousands upon thousands of unfortunate people, some of whom are being paid as low as $3 a week, working as long as 60 hours a week, there is great merit in this bill. There will be an immediate reduction from 60 to 44 hours and in two years thereafter, to 40 hours, and an immediate raise in hourly wage for those who are now receiving from $3 to $6 a week, to $11 a week."

Mr. Randolph, one of the Conferees:

"There are, of course, compromises in the Conference report on the final draft of the wage and hour bill which comes before us. They are reasonable and sensible compromises, but the principles remain the same. I ask you, as a plain matter of policy in this connection,

is it not best in this first federal bill, designed to bring up a little the wages at the bottom of the scale and regulate also the hours for the needy and underpaid workers of this country, to make certain concessions? Is it not better that we have exemptions, so that in future years, if found necessary and advisable, we can bring under this law other business or industry exempt in this first bill which establishes the principle of ending starvation wages and unfair competition? Certainly those who have had long experience as legislators in this body know that there must be some compromises made in bringing out a measure of this kind. We go into a new field.

"This bill properly enters the field of aiding and protecting those men and women in industry today who have no organization or collective bargaining agency to speak for them. The Congress of the United States on this occasion speaks for that group of individuals. So instead of being harsh your conferees have attempted to be sensible in this matter, and exemptions have been made and definitions have been placed in the bill which make it possible to bring a measure here which retains the best features of the House bill and good features of the Senate measure. And, after 10 or 11 days in a conference in which a very full and free discussion was undertaken, the gentleman from New Jersey (Mr. Hartley) joined in a unanimous report, and by his signature approved the work done. We come to you and say that, of course, this measure is not 100 percent perfect. Of course this bill does not involve all of the propositions many of us would like to have seen written into law; but certainly this measure is a well-balanced bill and takes into account the very ideas expressed by this body when the legislation was before us. I feel that it will take its place, along with the Social Security Act, as a great humanitarian effort. I trust; and I have reason to believe, that men and women on both sides of the aisle will join in almost unanimous approval of this fair, sensible, and trail-blazing conference report." (June 14, 1938, 83 Cong. Rec. 9258.)

Mr. Schneider, speaking on the Conference bill:

> "The American people are now aware of a situation where the helpless, unorganized, and submerged one-third of the population are being exploited mercilessly and ruthlessly. They are determined to put a stop, once and for all, to the human degradation caused by the payment of sweatshop and starvation wages, by the working of men and women for very long hours, and the employment of children in their tender years. The Congress now has a chance to speak out and adopt this proposed measure, which, despite any of its shortcomings, will go a long way to end the exploitation of the poorest paid, the hardest worked, and the most defenseless toilers." (June 14, 1938, 83 Cong. Rec. 9260.)

At page 9261, Mr. Schneider, continuing, said:

> "Mr. Speaker, the Secretary of Labor, Frances Perkins, in a radio address on May 17, 1938, declared that 'it is estimated that a minimum of 40 cents per hour would have affected 1,250,000 to 2,000,000 workers in the summer of 1937, including those in manufacturing, in wholesale trade, and other industries engaged in interstate commerce, except on railroads and interstate motor carriers.' She also stated that 'it is estimated that eventually the pending bill will shorten the hours of about 2,500,000 workers.' "

This statement is quite important because it shows that it was contemplated that the hours or overtime wage provisions would affect a number of employees not substantially different from the number covered by Section 6 minimum wages. Obviously, if the Secretary of Labor had viewed the legislation as affecting those classes of employees drawing wages in excess of the minimum prescribed by Section 6, then the numbers affected by Section 7 would have been many millions in excess of the estimate of the Secretary of Labor.

Mr. Fish, speaking on the Conference bill:

> "It strikes an effective blow against sweatshop hours, wages, and conditions that should have been

done long ago. It affects the welfare of millions of poor wage earners mostly unorganized, and who have little voice for themselves." (June 14, 1938, 83 Cong. Rec. 9262.)

Spreading Employment

The argument that penalty overtime wages were for the purpose of spreading employment for all classes is hardly tenable. In view of the fact that the Fair Labor Standards Act is in the form of permanent legislation, it can not be said that Congress contemplated a permanent unemployment problem with respect to all classes of employees. Congress might well have reasoned that something in the nature of a permanent employment problem might exist with respect to this large group of unskilled workers—they always have had an unemployment problem. Congress could well have reasoned that even if conditions arose which might temporarily relieve their employment problem, the minimum wages were so low that the payment of overtime based on the minimum would be beneficial to the employees and could not adversely affect the national interest. It would be quite a different thing to assume that Congress, in the initial step towards social legislation, should have inflicted on the country as a whole the inflationary principle of penalty overtime wage provisions affecting all classes of employees for all time, without regard for the effect or the relationship of such a provision to the objectives of the bill or to commerce generally.

The principal decisions of this Court dealing with the necessity for and importance of determining the intent of Congress were cited in the brief of Petitioner, Overnight Motor Transportation Company, Inc., and those arguments and citations need not be repeated here.

Precedents

The Administrator of the Fair Labor Standards Act filed with the Circuit Court of Appeals a brief as *Amicus Curiae* in this case, and presumably will do likewise here. In the

brief above referred to, reference is made to several federal statutes providing for the payment of overtime. The inference appears to be that as these statutes provided for the payment of overtime at rates based on amounts paid by the employer to the employee, such precedents are persuasive as to the intent of Congress under this Act.

An examination of the Acts cited by the Administrator discloses little, if any, similarity between those Acts and the Fair Labor Standards Act.

The *Public Printing Act*, January 12, 1895, Sec. 39, 28 Stat. 607, provided for the payment of overtime at a rate of 20 per cent in addition to the rate per hour. However, the rate per hour was fixed by the Public Printer pursuant to law. There did not exist the distinction between a statutory minimum and a rate actually being paid because there was only one hourly rate upon which overtime could possibly be computed. This Act was amended on March 4, 1904, 35 Stat. 1024, and the Public Printer was empowered to pay for overtime at a rate not exceeding 50 per cent in addition to the rate per hour; but still the one and only rate per hour was fixed by the Public Printer.

The *Customs Officers' and Employees' Act*, February 7, 1920, 41 Stat. 402, was cited by the Administrator, and that Act established the rate base as "the day's pay" and the overtime rate was one-half day's additional pay for each two hours of overtime at night and two additional day's pay for Sunday or holiday duty. But, here again, there was no choice between minimum wages and actual wages because there was only one wage, and that was fixed by law.

Reference was made to the *Act of March 4, 1917*, 39 Stat. 1192, providing for suspension of the 8-hour day on public works (27 Stat. 340) and work in excess of 8 hours was permitted with overtime rates "at not less than time and one-half". There was no choice here as between a statutory minimum and a contract rate. There was only one rate.

The *Walsh-Healey Public Contracts Act* of June 30, 1936, Sections 1 and 6, 49 Stat. 2036, 2038, provided for payment

of "prevailing minimum wage" rates to be determined by the Secretary of Labor, and then further provided for overtime and the payment for overtime at "not less than one and one-half times the basic hourly rate". Under this Act, there may have been a difference between the basic hourly rate established by the Secretary of Labor and the actual rate paid by the employer. We have found no case holding that where the Secretary had made a "prevailing minimum wage" finding that payment on that basis did not satisfy the law. In the administration of this law there does not appear to be the policy of penalizing employers in computing overtime on the basis of their voluntary payments to employees. The Wage and Hour Reporter, Volume 4, page 600, cites a ruling by the Public Contracts Administrator that excess payments to employees for work done on Saturdays and holidays does not have to be taken into consideration in determining the hourly rate upon which overtime must be paid under the Public Contracts Act.

While, as was pointed out in *Perkins* v. *Lukens Steel Company*, 310 U. S. 113, decided April 29, 1940, the conditions which the Government may attach to its business, concern the Government alone, it is interesting to note that the administration of this law recognizes the fact that no public purpose is to be served by forcing employers to pay penalty wages for overtime based on every conceivable formula.

The policy and findings section of the Fair Labor Standards Act (Sec. 2) discloses that unfair competition in commerce was one of the evils against which the Act was directed. This unfair competition arose in connection with goods produced on substandard labor conditions when in competition with goods produced under fair labor conditions. To put a ceiling on the increase in wages required of those operating under substandard conditions and impose no limitations with respect to those voluntarily paying wages in excess of the minimum would seem to create a disparity in labor costs as great or greater than that which

prevailed before the Act was passed. An employer who had paid only 20c an hour would, under the Act, be forced to raise the wage to 30c, and, if he did so, and no more, the ceiling under the overtime provisions would be 45c an hour, or a penalty of 15c an hour for the overtime worked. To take the employer who voluntarily paid 60c an hour and compel him to pay 90c an hour for overtime, would result in a penalty of 30c per hour for overtime, the 30c per hour penalty being 100 per cent greater than the penalty imposed on the employer who barely meets the requirements of the Act.

The bare fact that under the statute neither the high-wage nor the low-wage employer is required to work anyone overtime would not remove the crushing effect of the disparity in the overtime penalty rates. The statute was not enacted as an emergency or temporary measure. The shortage of labor in industrial communities may well compel a considerable amount of overtime for one manufacturer, whereas his competitor, located in a rural and non-industrial section, may not feel the effects of the labor shortage at all.

In addition to the foregoing, under the *National Industrial Recovery Administration Codes*, numerous provisions were made for minimum wages, maximum hours, and payments for overtime. Code No. 278, covering the Trucking Industry, was introduced February 26, 1935 in the hearings before the House Committee on Interstate and Foreign Commerce, in connection with H. R. 5262, 74th Congress, 1st Session, at page 193. Article V, Paragraphs 2 and 3 of that Code provided for the payment of overtime "at the rate of one and one-third (1-1/3) their normal rate". The provisions of this Code were diligently enforced not only by the Law Division of the N. I. R. A., but also by a special Compliance Division established by the industry. In no cases coming to our attention was it ever contended that aggregate payments amounting to the minimum straight time wage for the straight time hours, plus one and one-third times the straight time minimum wage for the over-

time hours did not fully comply with the requirements of the Code.

In the only two precedents that have come to our attention where there may possibly have been a choice between a statutory minimum and a higher contract wage; the first involving the Walsh-Healey Public Contracts Act, the overtime payments were not required to be pyramided on excess rates voluntarily paid by the employer; and the second, involving the Codes, appears to have been administered on the basis of the minimum wages prescribed by the Codes.

The Administrator has argued elsewhere, and presumably will do so here, that if Section 7 overtime was intended to be limited to wages covered by Section 6 minimum wages, there could have been no purpose in the provisions of Section 13 in exempting executive, administrative and professional employees because it is said that their compensation would, in practically all cases, exceed minimum wages. An analysis of the numerous exemptions contained in the Act clearly discloses that wages had nothing to do with any of the exemptions. The clearly established principle underlying the exemptions was the nature of the employment or the industry which made it impossible to punch a clock for the purpose of keeping time records, or, that the public service rendered by certain industries was paramount to the payment of overtime wages on a statutory basis.

It is further argued that if Section 7 overtime was intended to be limited to wages covered by Section 6 minimum wages, there could have been no purpose in the provisions of Section 7(b), Paragraphs (1) and (2), covering union agreements which limit employment to a fixed number of hours per year. The policy of Congress, as disclosed by Section 2(b), is "to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power." The provisions of Section 7(b), Paragraphs (1) and (2) are, as a practical matter, more closely related to the classes of employees covered by Section 6 than any other classes because they have

a greater need for taking full advantage of employment when they can get it than any other classes. There are also many industries in which employment is not necessarily seasonable but are subject to many other limitations on continuous operations.

In the debates in the House immediately preceding passage of the Conference bill, Mrs. Norton, who was in charge of the bill in the House, explained the purpose of these exemptions as follows:

> "This exemption will take care of the peculiar situation which exists in isolated mining and lumber camps which are located, in some cases, 75 or 100 miles from civilization. We have also provided an exemption from the basic maximum hours for employers who have adopted the annual wage plan." (June 14, 1938, 83 Cong. Rec. 9257.)

Conclusion of Point I

As we view the matter, this question could only be debatable here by reason of the fact that the provisions of Section 7 were drafted in conference and were never subject to Committee hearings or discussion and a Conference bill is not subject to amendment on the floor.

The Conferees understood the purposes of the legislation and expressed their understanding in their report and probably didn't foresee that anyone would or could, through some strained process of literal construction, distort the plain intent of Congress.

In concluding the argument on this point, we point to the abundance of evidence of the intent of Congress to limit the scope of the legislation with respect to both wages and hours to the lowest paid and unorganized employees.

II

The Private Right of Contract is Not Destroyed by the Act, but is Merely Restricted by a Minimum Wage Floor Below Which Employer and Employee May Not Contract. Petitioner is Entitled to the Usual and Ordinary Presumption that the Parties Contemplated Compliance With the Law in Their Over-All Contract.

Respondent seeks a judicial reformation of his employment agreement to raise his *straight time pay far beyond the limits fixed in Sec. 6*, and then contends for an all-inclusive construction of Sec. 7, in order that he may recover an unexpected and unearned windfall.

Administrative Rulings

The position first taken by the Administrator of the Fair Labor Standards Act on Sept. 29, 1938, was that Congress had dealt with the subject in a limited way only and that there could be no question of violation of the law by the payment of weekly salaries in cases of this kind. That view displeased those who advocate broadening of the statute by construction beyond the intent of Congress, and on October 21, 1938, his Bulletin No. 4, Wage-Hour Manual, 1940 Edition, Page 95, appeared to reverse the prior position.

We make the qualifying statement that Interpretative Bulletin No. 4 *appeared* to revise the prior position. However, as late as April 14, 1941, we find that the instructions of the Assistant Solicitor of the Wage-Hour Division to the field staff of the Division are in substantial accord with the original position of the Administrator. The opinion involved determination of straight time and overtime compensation in cases involving fixed weekly salaries for both a regular number of hours and for an indefinite number of hours.

The Solicitor ruled:

> "'The question is one of fact. No rule can be laid down to be applied in all instances. The situation is

much the same as one which would arise in contract law if an employee brought suit to recover an amount in excess of the regular salary paid him, alleging that the salary was compensation for a specified number of hours and that he had on certain occasions worked in excess of that specified number. The court would then proceed to determine the facts, and if on all the facts it determined that the employee had not been fully paid, it would award him additional compensation on a basis which in legal terminology is known as *quantum meruit*; that is, the employee having been employed at a fixed rate of pay is entitled to compensation at that rate for all services rendered. For our purposes the distinction between so-called irregular and fluctuating or regular workweek is much the same. The test is, does the employer hire the employee at a salary for a certain number of hours and does he, therefore, owe the employee additional compensation on a prorata basis when that specified number of hours is exceeded; or can the employer successfully contend that the facts and circumstances of employment are such that the salary is the employee's regular compensation for all hours worked, no matter what the exact number of hours may be. * * * In summing up, we may state the rule as follows: Given an employee employed on a salary basis it is necessary to determine as a matter of fact how many hours of work per workweek the employer may exact from the employee in exchange for such salary. As we stated before, the answer to such question depends upon an examination and evalution of all of the pertinent facts and circumstances in a given case. We have to know when an employee works 60 hours and receives a salary of $30 in a given work week, whether or not that $30 is all the employer owes the employee as his regular compensation for a workweek of such length. A test such as the following may prove workable: Is the salaried employee hired to do a job rather than to work a schedule of hours? Does the job necessarily involve irregular or fluctuating hours per day or week? The questions taken together constitute a single test; one question is not complete in itself."

The foregoing opinion was given by an Assistant Solicitor to the field representatives of the Labor Department for

their guidance. The opinion was furnished to and published by the Wage and Hour Reporter. (4 W. H. R. 181)

It has always been contended that the clerk-dispatcher, Missel, was employed by the week to do a job and was not employed for any definite number of hours. The Assistant Solicitor says that the test as to whether there is any liability under the Fair Labor Standards Act, is whether there would be any liability in court for additional compensation under the employment contract. If what the Assistant Solicitor says can be relied on, that ought to dispose of this case, because certainly, no court in the land would award another dime of compensation under the employment contract.

It may be the duty of the Administrator to endeavor to establish the broadest possible coverage for the Act which he administers. This effort has led to many conflicting and confusing bulletins. This observation is made for the particular purpose of pointing out that interpretations expressed in "releases", "letters", "views", "inter-office correspondence", and "rulings", made by almost anyone on the Administrator's staff, and never finding their way into the Federal Register, should not be adopted as aids to construction without much caution.

Industry Facts

Certain facts in connection with the industry disclose the reasons for making wage agreements on a weekly or monthly basis. These facts go far toward conclusively demonstrating that those wage agreements which had prevailed in the industry since its beginning, were not made for the purpose of evading the Fair Labor Standards Act. The industry facts and the course of conduct which flowed from those facts certainly should go far toward avoidance of construction which would convert a lawful agreement into an unlawful one, and should go far toward disposing of the question as to whether, in the discretion of the courts, penalties should be inflicted.

In 1935, when Congress was considering the Motor Carrier Act, certain transportation statistics were presented at the committee hearings. These data were compiled largely from surveys made under the N. I. R. A. Codes. In part I of the hearings before the Senate Committee on Interstate Commerce, in connection with S. 1629, February 25th to March 6, 1935, at page 309, it is shown that of the 190,000 motor carriers registered under the Code, about 80 per cent of them operated only one vehicle, and that only 5 per cent operated 5 or more vehicles.

The 1941 figures compiled by the Interstate Commerce Commission show that of the 40,000 carriers fully regulated by the Commission, only about 1,200, or 3 per cent had a gross business of $100,000 or more per year. From an operating standpoint, there isn't much difference between the main terminal of a small carrier and the scattered branch terminals of a large carrier. In both cases the volume of business passing through a particular terminal is relatively small, and a terminal employee, regardless of what he is called, has many and varied duties and responsibilities, and, generally speaking, it is not possible to establish an around-the-clock staff on regular 6 or 8-hour daily shifts.

The requirements of shippers and the arrival and departure of trucks are necessarily very irregular, and these terminal employees use their own judgment and run the terminals in accordance with the nature of the business and the variations in the amount of business from time to time. They know when they must work, when they must be on duty, and they always have a degree of responsibility, and that is why they are paid by the week to do a job. It serves to illustrate how impracticable it would be to determine an hourly basis for compensation.

They are very much like the railroad agent at a way station on a branch line. He is there when the trains come in and he is there in between times only to the extent necessary to do the volume of work on hand.

Many of these terminal employees on truck lines could be compared with the railroad employee who has the job

of running a pump and keeping a tank full of water. He is employed to do a job. He is paid by the month. He is responsible for results. He doesn't punch a clock when he goes to work, nor when he leaves, and his responsibility is continuous. He may work all day and all night too, or he may have very little to do.

Theory must yield to the practical problems of industry and it cannot be imputed to Congress that it intended to disregard these considerations.

It is not contended that the problems of the industry necessarily determine whether an employee may or may not be protected by a statute, but the problems of an industry which require the payment of wages on a weekly basis for services involving indefinite hours, should not by strained construction be permitted to inflict ruinous penalties when those contracts and wage agreements as made can be and should be construed as complying with the law.

Congress knew there were many situations in transportation which did not lend themselves to clock punching and **that is why all railroad employees were exempted from the** penalty overtime wage provisions. Likewise, seamen and others were exempted.

Duties of Terminal Employees

Most motor carriers serve all intermediate points. These intermediate points may be compared with the railroad way stations. Usually, a railroad way station is served by only one railroad, but a motor carrier intermediate point may be, and generally is, served by more than one motor carrier. This competition operates to reduce the volume handled at a particular intermediate terminal point. There are comparatively few joint terminals—those are confined to the larger cities.

These intermediate terminals are open from a few hours per day to 24 hours per day, depending on the size of the town and the volume of business of a particular carrier and on the business practices of the patrons. The men who

are employed at these terminals are variously called "agents", "rate clerks", "dispatchers", "cashiers", or just "clerks". They represent a class of employees who perform various duties, which include, receiving orders from and notifying shippers; collecting for C. O. D. shipments; quoting rates and collecting freight charges; tracing shipments; soliciting business and settling loss and damage claims; keeping books; handling petty cash accounts; paying drivers and helpers; dispatching trucks; and investigating and reporting accidents.

As early as December 23, 1936, the Interstate Commerce Commission promulgated and published in the Federal Register many safety regulations governing the inspection and equipment of vehicles, the marking, handling, care, and disposition of explosives, poisons and corrosives. Both employers and employees were charged with the duty of observing and seeing that these regulations were observed. There are many regulations promulgated by the Secretary of Agriculture dealing with quarantines and many other regulations of the Secretary having to do with the handling and protection of meats and other foods. It is the duty of the terminal man to comply and to direct compliance with these numerous regulations.

The foregoing illustrations serve to show how impractical it would be to convert these men into clock-punchers, and why, in the course of a day or a week, their responsibility may, at times, involve long hours.

The Fair Labor Standards Act, Section 13(a), provides for the exemption of "any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator)." It would have been simple to have taken care of these problems by considering these men as administrative employees. But, if the Administrator has acted within the scope of his authority in determining who were administrative employees, he has closed the door to that avenue of escape. The Administrator has ruled that

if any employee's duties involve more than 20 per cent of non-exempt classes of work, the Act applies to the employee with respect to his full time (See 29 Code of Federal Regulations 541, *et seq.*).

We had supposed that ability and willingness to perform various duties was one of the essential characteristics of an executive or administrative employee rather than an arbitrary "delimitation" based on either percentages or salaries. And while our views have found support in the decisions of the courts which have had occasion to pass on the question (*Devoe* v. *Atlanta Paper Co.*, D. C., Ga., 40 F. Supp. 284; *Tune* v. *Roselawn Florists*, D. C., Tex., 9/24/41, 4 Wage Hour Rep. 596), we realize that the issue has not been formally raised in this case. It did not seem possible to present to the courts below every question involved in the case.

The conflicts which have arisen by reason of the refusal of employees on the staff of the Administrator to recognize bona fide labor agreements with A. F. of L. unions will be discussed in connection with penalties.

The Position of Labor Unions

Labor unions didn't ask Congress to fix a statutory penalty wage for overtime for all classes of employees. They didn't object with respect to the low-paid group because generally that group didn't belong to unions and they were very difficult to organize. The negotiation of wage agreements for those above the minimum wages and inclusion or exclusion of penalty overtime wages has always been a function of the unions. These agreements are generally negotiated with some regard for the economic and competitive conditions in each industry and with some knowledge of the facts. No such results can fairly be accomplished through legislative fiat, and it is not reasonable to assume that Congress undertook to do so.

All union agreements in the trucking industry call for wages in excess of minimum wages provided under Sec. 6.

Many of the agreements do not have any overtime penalty rate provisions, and others start the penalty rates after anywhere from 40 to 54 hours, depending upon the nature of the operations. Many of the agreements recognize the desirability and necessity of a minimum weekly income, as distinguished from minimum hourly rates. Under these contracts, the employer pays for a minimum number of hours regardless of whether he has work for the employees to do or not, and these agreements frequently call for a minimum number of hours considerably in excess of 40 hours.

The industry cannot survive in such a hostile atmosphere and in the face of such conflicting views with respect to its liabilities with the prospect of retroactive assessments with double penalties.

The railroad labor unions are largely responsible for the exemption of the railroads from the penalty overtime provisions. There are more motor carrier employees in unions affiliated with the A. F. of L. than there are railroad employees members of the railroad labor unions and no one has suggested that the American Federation of Labor unions were less diligent in promoting the interests of motor carrier employees than the railroad labor unions are in protecting their employees.

In connection with the consideration of this legislation by Congress, various provisions were proposed to recognize existing labor contracts differing in terms from the provisions of Sections 6 and 7, and such recognition was to run for the life of those contracts. The Conference bill totally disregarded existing labor contracts, and, if construed to embrace all classes of employees regardless of salary, it would have forced an immediate cancellation and re-negotiation of most of the agreements in effect throughout the United States. If such a result were contemplated, we would certainly expect to find something in the record to make it clear. The fact that there are no provisions in the law giving recognition to existing labor agreements for any period is strongly persuasive of the view that Congress

enacted a minimum wage law, which did not invade the field already occupied by the unions.

The practical problems involved in the operation of an industry are far better understood by the business agents of the unions than by the Administrator's staff. This problem is well illustrated by the case of dockmen or platform workers. These men load freight into trucks, take freight off of trucks, wheel freight along the platform from one truck to another, and between the trucks and the warehouses. To a large extent, these duties are interchangeable depending upon the volume of business and the size of the terminal. Ordinarily, they are all covered in one union agreement at one rate of pay. A large portion of the industry operates under such agreements with the union.

This industry has been confronted with conflicting "administrative rulings" issued by the Administrators; conflicts in opinion between the Administrators and the Interstate Commerce Commission with respect to which employees affected safety; and conflicts between the unions and the Administrators with respect to coverage under the Act.

The union agreements were generally based on consideration of the work usually done by a class of employees and dockmen who load and unload trucks are ordinarily covered under the same union contract and no distinction was made as to whether they load trucks one day and unload them the next day. However, the Wage-Hour Administrator sought to apply the law to these men individually and in accordance with particular jobs they might be doing on a particular day or particular week. These rulings conflicted with the findings of the Interstate Commerce Commission with respect to its jurisdiction over employees affecting safety and conflicted with the union contracts. The rulings of the Administrator fomented dissension and dissatisfaction among the employees and numerous suits were filed against members of the industry. It was not until about 10 United States District Courts ruled against the Administrator that he revised his Interpretative Bulletin

No. 9 (Fourth Revision, March, 1942, 5 W. H. R. 233) to give recognition, in part, to the jurisdiction of the Interstate Commerce Commission. For three long years, the industry was harassed by suits demanding reformation of contracts which involved union agreements and demanding overtime wages at penalty rates, together with 100 per cent additional as statutory penalties. In every case, it was urged on the courts that the administrative rulings by the Wage-Hour Administrator should be adopted by the courts.

Conclusion of Point II

Before the employer in this case can be found to have violated the Fair Labor Standards Act under any theory, it is necessary to force, by construction, a weekly wage far beyond the limitations of the Act with respect to straight time wages, because it is only by so doing that a deficit in the payment of overtime can be created.

There is another very important factor in connection with employer and employee relations which the interpretations of the Administrator completely overlook. Practically every guaranteed weekly or monthly wage involves much more than payment for hours actually worked. These guaranteed wages assure the employer of the availability of the employee's services. They are in the nature of payments for stand-by or demand services. These payments are made whether work is required or not. There is a valid consideration for these payments, but it is not consideration for work and should not be disregarded in any process of reformation of contract for the purpose of determining either straight time or overtime wages. In the weeks involving long hours, the payments may barely cover the wages; but in the other weeks involving short hours, the excess payments are substantial.

Tested by every reasonable approach, this wage agreement complied with the law, gave the employee the security of a regular income, and gave the employer the assurance of his availability for service.

One of the striking features of the interpretation of "regular rate", as applied by the Administrator in this case, is that such "regular" rate cannot possibly be determined until after the employment has been completed. In other words, the determination of the "regular rate at which he is employed" is an *ex post facto* process, and this process results in an inevitable deficit for overtime regardless of the amount of wages paid. The construction contended for by the Administrator presumes that the employer did not include overtime in the aggregate wage and that instead of contracting to comply with the law, he contracted on a basis that would inevitably make him liable for overtime wages at a penalty rate, and in an amount which could not be determined in advance. People don't usually contract that way and it is a strange distortion of ordinary business relations to assume that they did; all for no other purpose than to convert an agreement which complies with the law into one which must violate the law. We submit that it is a most irregular way of determining a regular rate of pay.

III

The Double Penalty Provisions of Sec. 16, and the Overtime Pay Provisions of Sec. 7 in the Nature of a Penalty, Are Discretionary With and Not Mandatory Upon the Courts in Cases of Good Faith Litigation, and a Ruling that They Are Mandatory Deprives Petitioner of the Protection of the "Due Process" Provisions of the Constitution.

The argument and citations made in brief of Petitioner, Overnight Motor Transportation Company, Inc., need not be repeated here. We confine our discussion of this point to one additional observation. Section 10(a) specifically provides for judicial review. Would it not be strange to have provision for judicial review specifically set forth in the Act and then, as the Circuit Court held, to deprive the court of discretion with respect to penalties?

Apart from the constitutional questions discussed in Petitioner's brief, reference to Sec. 10(b) discloses that where

bonds are required, the amount of the bond is specifically limited to the amount represented by the difference between the wages paid and the wages claimed under the Act. No provision is made for a bond to cover penalties under Sec. 16(a). Obviously, it was never for a moment supposed that there could be an imposition of penalties in connection with any good faith litigation.

IV

The Act Imposes a Legislative Function to be Performed by the Interstate Commerce Commission for the Purpose of Implementing the Scope of Sec. 7, and Prior Determination of Facts by the Commission is a Prerequisite, Under the Primary-Jurisdiction Rule, to Action by the Courts.

The argument and citations made in brief of Petitioner, Overnight Motor Transportation Company, Inc., need not be repeated here. We confine our discussion of this point to one additional observation. In Respondent's brief before this court in opposition to petition for certiorari, it was argued that it would not be reasonable to apply the rule of primary-jurisdiction in the Interstate Commerce Commission to Respondent and it was stated that to do so would be "a legal exemplification of 'a Mahomet's body' suspended between the Fair Labor Standards Act and the Interstate Commerce Act * * *."

This argument presupposes some inherent right in Respondent to immediate coverage irrespective of all other considerations. Most transportation employees don't have any coverage at all under Sec. 7. Other classes require an administrative determination by the Interstate Commerce Commission in order to implement the Fair Labor Standards Act. There is nothing novel in the suspension of a statute pending its implementation by administrative determination. The Railway Labor Acts (45 U. S. C. A. 151, *et seq*) do not apply to employees of "interurban lines" unless and until the Commission finds from time to time, and as the nature of their operations may change, that they

are operating as a part of the steam road system. There, as here, the facts must be determined before the laws have application to particular employees.

The same situation arises with respect to the question as to whether a particular employee is engaged in interstate or intrastate commerce. Those are determinations which cannot, in the nature of things, be made by statute, but require an examination of the facts as they may vary from time to time. No employee can have the right to complain because this process may inevitably result in a period of uncertainty. The existence of these questions was recognized by Congress and in the debate on the Conference bill Senator Pepper, one of the Conferees, said: "The Conferees made no declaration. They merely have agreed on a measure which is applicable to the situation when the facts are presented. We have not defined the scope of it; we have merely said this is the law, and the facts will then determine its application." 83 Cong. Rec., p. 9168.

CONCLUSION

The overtime wage provisions of Section 7 should be construed to be co-extensive with the straight time wage provisions of Section 6, and no more.

Congressional intent, as disclosed by the legislative history, shows that Congress was interested in only the lowest wage brackets. No one even suggested that well-paid employees were not able to protect their hours or that their hours burdened commerce.

The inconsistency of permanent, inflexible legislation is now being demonstrated in connection with the war program.

The sound foundation of social gains already established would be preserved for future building if prudently applied at this time, as distinguished from Utopian ideals which may have the quality of destruction because of impractical results.

If a different view be adopted, then the payment of weekly and monthly salaries in excess of minimum wages, fully satisfies the law.

Respectfully submitted,

J. NINIAN BEALL,
Attorney for
AMERICAN TRUCKING ASSOCIATIONS, INC.,
Amicus Curiae.

March 31, 1942.

APPENDIX

STATUTORY PROVISIONS.

The pertinent statutory provisions are as follows:

Fair Labor Standards Act, 29 U. S. C. A. 201, et seq.:

"Finding and Declaration of Policy

"Sec. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce."

* * *

"Industry Committees

"Sec. 5. (a) The Administrator shall as soon as practicable appoint an industry committee for each industry engaged in commerce or in the production of goods for commerce."

* * *

"Minimum Wages

"Sec. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

"(1) during the first year from the effective date of this section, not less than 25 cents an hour,

"(2) during the next six years from such date, not less than 30 cents an hour,

"(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the

Administrator issued under section 8, whichever is lower and

"(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8.

"(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

"Maximum Hours

"Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

"(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

"(2) for a workweek longer than forty-two hours during the second year from such date, or

"(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

"Wage Orders

"Sec. 8. (a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.

"(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee

thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The Committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.

"(c) The industry committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classifications, no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

"(1) competitive conditions as affected by transportation, living, and production costs;

"(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

"(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry.

No classification shall be made under this section on the basis of age or sex."

* * *

"Exemptions

"Sec. 13 (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retail-

ing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); * * *."

"(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act."

* * *

"Penalties

"Sec. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

"(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

* * * * * * *

Interstate Commerce Act, Part II, 49 U. S. C. A. 301, et seq.:

"General Duties and Powers of the Commission

"Sec. 204 (a) It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continu-

ous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

* * * *

"(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. * * * "

* * *

CHRONOLOGY

LEGISLATION, LITIGATION AND ADMINISTRATION

12-23-36	Interstate Commerce Commission prescribed safety regulations, Ex Parte MC-4, 1 M. C. C. 1.
5-24-37	Wage-Hour Bills introduced in Senate (S. 2475) and House (H. R. 7200).
6- -37	Joint Committee Hearings held.
7-31-37	S. 2475 passed the Senate and referred to House Committee.
8- 6-37	S. 2475 reported by House Committee (House Report 1452).
12-13-37	S. 2475 recommitted to House Committee.
4-21-38	S. 2475 reported by House Committee (House Report 2182).
5-24-38	S. 2475 passed by House.
6-14-38	S. 2475, as Conference Bill, submitted in House and Senate and passed.
9-29-38	Wage-Hour Administrator construes law (Birmingham Speech).
10-21-38	Wage-Hour Administrator issues Bulletin No. 4, apparently rescinding "Birmingham Ruling", 1940 Wage Hour Manual, p. 95.
5- 9-39	Interstate Commerce Commission denies jurisdiction over motor carrier employees except for safety, Ex Parte MC-28, 13 M. C. C. 481.
12- 4-39	District Court reverses decision of I. C. C. in Ex Parte MC-28, Amer. Trucking Assns., Inc. v. U. S., 31 F. Supp. 35.

5-27-40	Supreme Court reverses District Court and upholds I. C. C. order in Ex Parte MC-28, U. S. v. Amer. Trucking Assns., Inc., 310 U. S. 534.
10-14-40	Supreme Court denies rehearing in A. T. A. case, 311 U. S. 724.
10-19-40	Missel (Respondent) resigned from employ of Overnight Motor Transp. Co. (Petitioner).
10-29-40	Missel (Respondent) brought suit against Petitioner.
2-20-41	District Court overrules motion to dismiss, Missel v. Overnight Motor Transp. Co., 36 F. Supp. 980.
3- 4-41	I. C. C. determines what employees have duties affecting safety, Ex Parte MC-2 and MC-3, 28 M. C. C. 125.
7-28-41	District Court construes Act to have limited application, Missel v. Overnight Motor Transp. Co., 40 F. Supp. 174.
1- 5-42	Circuit Court of Appeals, 4th Circ., reverses District Court, Missel v. Overnight Motor Transp. Co., 5 W. H. R. 25.
2-16-42	Supreme Court grants certiorari, Overnight Motor Transportation Co. v. Missel, No. 939, 62 S. Ct. 641.

SUPREME COURT OF THE UNITED STATES,

No. 939.—October Term, 1941.

Overnight Motor Transportation Company, Inc., Petitioner, *vs.* William H. Missel. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[June 8, 1942.]

Mr. Justice Reed delivered the opinion of the Court.

This case involves the application of the overtime section of the Fair Labor Standards Act of 1938[1] to an employee working irregular hours for a fixed weekly wage.

Respondent, Missel, was an employee of the petitioner, Overnight Motor Transportation Company, a corporation engaged in interstate motor transportation as a common carrier. He acted as rate clerk and performed other incidental duties, none of which were connected with safety of operation. The work for which he was employed involved wide fluctuations in the time required to complete his duties. The employment of respondent began before the effective date of the Fair Labor Standards Act, October 24, 1938, and terminated October 19, 1940. Until November 1, 1938, his salary was $25.50 per week and thereafter $27.50. Time records are available for only a third of the critical period, and these show an average work week of 65 hours, with a maximum of 80 for each of two weeks in the first year of the Act's operation and a maximum of 75 hours in each of three weeks in the second year. Nothing above the weekly wage was paid, because these maximum workweeks, computed at the statutory minimum rates with time and

[1] "Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 52 Stat. 1063; 29 U. S. C. § 207.

a half for overtime for the years in question, would not require an addition to the weekly wage.

Respondent brought a statutory action to recover alleged unpaid overtime compensation in such sum as might be found due him, an additional equal amount as liquidated damages, and counsel fee.[2] The trial court, refusing to hear evidence on the precise amount claimed, decided in favor of the petitioner on the ground that an agreement for a fixed weekly wage for irregular hours satisfied the requirements of the Act. Under such circumstances the court was of the view that pay would be adequate which amounted to the required minimum for the regular hours and time and a half the minimum for overtime. 40 F. Supp. 174. The Circuit Court of Appeals reversed with directions to enter judgment for the plaintiff in accordance with its opinion, an order which we interpret as authorizing a hearing in the trial court as to the amounts due. 126 F. 2d 98. As the questions involved were important in the administration of the Fair Labor Standards Act, we granted certiorari. — U. S. —.

Petitioner renews here its contentions that the private right to contract for a fixed weekly wage with employees in commerce is restricted only by the requirement that the wages paid should comply with the minimum wage schedule of the Fair Labor Standards Act, section 6, with overtime pay at time and a half that minimum, that in any event the Act does not preclude lump sum salaries in excess of the minimum, and that a contrary interpretation of the statute would render it unconstitutional.

It is plain that the respondent as a transportation worker was engaged in commerce within the meaning of the Act,[3] and unless

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[2] "SEC. 16. . . .

"(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 52 Stat. 1069, 29 U. S. C. § 216.

[3] "SEC. 3. As used in this Act—

. . . . . .

(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." 52 Stat. 1060, 29 U. S. C. § 203.

specifically exempted was entitled to whatever benefits the overtime provisions conferred.

While now conceding that *United States* v. *Darby*, 312 U. S. 100, settles the constitutional power of Congress to legislate against labor conditions detrimental to a minimum standard of living required for the general well-being of workers, petitioner argues that there is no power under the Constitution to regulate the hours or wages of workers whose pay, in every instance, at least equals the minimum and whose hours are not injurious to health. Freedom of contract between employer and employee, it is urged, is destroyed by such an interpretation.[4] But hours or wages not patently burdensome to health may yet be subject to regulation to achieve other purposes. We assume here the statutory objectives discussed later, i. e., that the act is aimed at hours as well as wages. The commerce power is plenary,[5] may deal with activities in connection with production for commerce[6] and as said in the *Darby* case, may extend "to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." P. 118. Long hours may impede the free interstate flow of commodities by creating friction between production areas with different length workweeks, by offering opportunities for unfair competition through undue extension of hours, and by inducing labor discontent apt to lead to interference with commerce through interruption of work. Overtime pay probably will not solve all problems of overtime work, but Congress may properly use it to lessen the irritations. Substandard labor conditions were deemed by Congress to be "injurious to the commerce and to the states from and to which the commerce flows." *United States* v. *Darby*, 312 U. S. 100, 115. To protect that commerce from the consequences of production of goods under substandard conditions, it may choose means reasonably adapted to those ends, including regulation of intra-

[4] "It is Petitioner's contention that though the constitutionality is clearly settled as to the question of correcting 'sub-standard labor conditions', a construction of the Act which has no relationship whatsoever to 'sub-standard labor conditions' would nonetheless be unconstitutional, for the potentiality of such a construction is to destroy freedom of contract between employer and employee."

[5] Labor Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 37.

[6] Santa Cruz Co. v. Labor Board, 303 U. S. 453, 464.

state activities, p. 121, by minimum wage and maximum hour requirements, p. 123. Compare *Santa Cruz Co.* v. *Labor Board*, 303 U. S. 453, 466. If overtime pay may have this effect upon commerce, private contracts made before or after the passage of legislation regulating overtime cannot take the overtime transactions "from the reach of dominant constitutional power." *Norman* v *B. & O. R. Co.*, 294 U. S. 240, 306-311. If in the judgment of Congress time and a half for overtime has a substantial effect on these conditions it lies with Congress' power to use it to promote the employees' well-being.

Statutory Construction. The petitioner attacks the basic conceptions upon which the Circuit Court of Appeals determined that the compensation paid by the respondent violated section 7(a) of the act.[7] That court felt that "one of the fundamental purposes of the Act was to induce work-sharing and relieve unemployment by reducing hours of work." We agree that the purpose of the act was not limited to a scheme to raise substandard wages first by a minimum wage and then by increased pay for overtime work. Of course, this was one effect of the time and a half provision, but another and an intended effect was to require extra pay for overtime work by those covered by the act even though their hourly wages exceeded the statutory minimum. The provision of section 7(a) requiring this extra pay for overtime is clear and unambiguous. It calls for 150% of the regular, not the minimum, wage. By this requirement, although overtime was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage and workers were assured additional pay to compensate them for the burden of a workweek beyond the hours fixed in the act. In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work. Reduction of hours was a part of the plan from the beginning. "A fair day's pay for a fair day's work" was the objective stated in the Presidential message which initiated the legislation.[8] That message referred to a "general maximum working week", "longer hours on the payment of time and a half for overtime" and the evil of "overwork" as well as "underpay." The message of November 15, 1937, calling for the enactment of this type of legislation referred again to protection from excessive

[7] Note 1 *supra.*

[8] May 24, 1937, 81 Cong. Rec. 4983, 75th Cong., 1st Sess., Sen. Rep. No. 884 on S. 2475, July 6, 1937, p. 2.

hours.[9] Senate Report No. 884 just cited, page 4, the companion House Report[10] and the Conference report[11] all spoke of maximum hours as a separately desirable object. Indeed, the form of the act itself in setting up two sections of standards, Section 6 for wages and Section 7 for hours, emphasizes the duality of the Congressional purpose. The existence of such a purpose is no less certain because Congress chose to use a less drastic form of limitation than outright prohibition of overtime. We conclude that the act was designed to require payment for overtime at time and a half the regular pay, where that pay is above the minimum, as well as where the regular pay is at the minimum.[12]

We now come to the determination of the meaning of the words "the regular rate at which he is employed." Since we have previously determined in this opinion, in the discussion of petitioner's objection to the application of the Act on the ground of unconstitutionality, that the scope of the commerce power is broad enough to support federal regulation of hours, we are concerned at this point only with the method of finding the regular rate under the contract with respondent. Congress might have sought its objective of clearing the channel of commerce of the obstacles of burdensome labor disputes by minimum wage legislation only. We have seen that it added overtime pay. The wages for minimum pay are expressed in terms of so much an hour. Sec. 6(a)(1)—"Not less than 25 cents an hour" with raises for succeeding years or by order of the Administrator under Sec. 8. Cf. *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126. Neither the wage, the hour nor the overtime provisions of sections 6 and 7 on their passage spoke specifically of any other method of paying wages except by hourly rate.[13] But we have no doubt that pay by the week, to be reduced by some method of computation to hourly rates, was also covered

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[9] 82 Cong. Rec. 11, 75th Cong., 2d Sess.

[10] House Rep. 1452, 75th Cong., 1st Sess., pp. 14, 15.

[11] 83 Cong. Rec. 9246, 9254.

[12] Cf. Bumpus v. Continental Baking Co., 124 F. 2d 549, 551; Carleton Screw Products Co. v. Fleming, 126 F. 2d 537, 539; Tidewater Optical Co. v. Wittkamp, 179 Va. 545, 551, 19 S. E. 2d 897, 899; McMillan v. Wilson & Co., 2 N. W. 2d 838, 839 (Minn. Sup. Ct.); see United States v. Darby, 312 U. S. 100, 125.

[13] Sec. 3(m) defined wage to include board, lodging or other facility customarily furnished employees. The Joint Resolution of June 26, 1940, for work relief and relief for the fiscal year 1941, Sec. 3(f) deals with piece work in Puerto Rico or the Virgin Islands. 54 Stat. 611, 616.

by the act.[14] It is likewise abundantly clear from the words of section 7 that the unit of time under that section within which to distinguish regular from overtime is the week. "No employer shall . . . employ any of his employees . . . (1) for a workweek longer than forty-four hours . . ." Sec. 7(a)(1).[15]

No problem is presented in assimilating the computation of overtime for employees under contract for a fixed weekly wage for regular contract hours which are the actual hours worked,[16] to similar computations for employees on hourly rates. Where the employment contract is for a weekly wage with variable or fluctuating hours the same method of computation produces the regular rate for each week. As that rate is on an hourly basis, it is regular in the statutory sense inasmuch as the rate per hour does not vary for the entire week, though week by week the regular rate varies with the number of hours worked. It is true that the longer the hours the less the rate and the pay per hour. This is not an argument, however, against this method of determining the regular rate of employment for the week in question. Apart from the Act if there is a fixed weekly wage regardless of the length of the workweek, the longer the hours the less are the earnings per hour. This method of computation has been approved by each circuit court of appeals which has considered such problems. See *Warren Bradshaw Drilling Co.* v. *Hall*, 124 F. 2d 42, 44; *Bumpus* v. *Continental Baking Co.*, 124 F. 2d 549, 552, cf. *Carleton Screw Products Co.* v. *Fleming*, 126 F. 2d 537, 541. It is this quotient which is the "regular rate at which an employee is employed" under contracts of the types described and applied in this para-

[14] Any other interpretation would render almost useless the exemptions from the act of employees in "executive, administrative, professional or local retailing capacity, or in the capacity of outside salesmen." Sec. 13(a)(1). Such employees are rarely paid by the hour.

[15] The legislative history of the Fair Labor Standards Act is inconclusive as to the intended meaning of the words "the regular rate at which he is employed." The committee reports do not discuss them. The bill which came out of the Conference and was adopted changed "regular hourly rate" of previous bills (S. 2475, introduced May 24, 1937; H. R. 7200, introduced May 24, 1937; and S. 2475 in the Senate, April 20, Calendar Day May 25, 1938) to "regular rate." Conference Report, 83 Cong. Rec. 9247, 75th Cong., 3rd Sess. "Hourly" may have been omitted as not descriptive of piecework or salary payments.

[16] Wage divided by hours equals regular rate. Time and a half regular rate for hours employed beyond statutory maximum equals compensation for overtime hours.

graph for fixed weekly compensation for hours, certain or variable.[17]

Petitioner invokes the presumption that contracting parties contemplate compliance with law and contends that accordingly there is no warrant for construing the contract as paying the employee only his base pay or "regular rate," regardless of hours worked. It is true that the wage paid was sufficiently large to cover both base pay and fifty per cent additional for the hours actually worked over the statutory maximum without violating section six. But there was no contractual limit upon the hours which petitioner could have required respondent to work for the agreed wage, had he seen fit to do so, and no provision for additional pay in the event the hours worked required minimum compensation greater than the fixed wage. Implication cannot mend a contract so deficient in complying with the law. This contract differs from the one in *Walling* v. *Belo*, decided today, where the contract specified an hourly rate and not less than time and a half for overtime, with a guaranty of a fixed weekly sum, and required the employer to pay more than the weekly guaranty where the hours worked at the contract rate exceeded that sum.

In the Circuit Court of Appeals[18] it was held that the liquidated damages provision, section 16(b) of the Act, 52 Stat. 1069, was mandatory on the courts, regardless of the good faith of the employer or the reasonableness of his attitude. Petitioner attacks this conclusion as a denial of due process because if the damage provision is mandatory, the employer is "without opportunity to test the issues before the courts," citing *Ex parte Young*, 209 U. S. 123, *Wadley Southern Ry.* v. *Georgia*, 235 U. S. 651, and other similar cases. Petitioner points out that if there was a failure to pay the statutory overtime, it resulted from an inability to determine whether the employee was covered by the Act.

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[17] This has been the Administrator's interpretation of the Act. Interpretative Bulletin No. 4 issued October 21, 1938, revised November, 1940. While the interpretative bulletins are not issued as regulations under statutory authority, they do carry persuasiveness as an expression of the view of those experienced in the administration of the Act and acting with the advice of a staff specializing in its interpretation and application. Cf. United States v. American Trucking Associations, 310 U. S. 534, 549; United States v. Darby, 312 U. S. 100, 118, n. 2; Graves v. Armstrong Creamery Co., 154 Kansas 365, 370, 118 P. 2d 613, 616. Even negative construction may be significant. Trade Comm'n v. Bunte Bros., 312 U. S. 349, 351, 352.

Regulations on records issued pursuant to section 11(a) have since September 15, 1941, referred to Interpretative Bulletin 4 for the method of computation. 6 Fed. Reg. 4695, n. 9.

[18] 126 F. 2d 98, 111, and cases cited which so construed the Act.

Section 13(b)(1)[19] exempts from section 7 employees for whom the Interstate Commerce Commission has power to establish maximum hours of service. This exemption was derived from the Motor Carrier Act of 1935, 49 Stat. 543, which authorized the Commission to regulate "maximum hours of service of employees." A definitive order leaving employees with the duties of respondent subject to the Fair Labor Standards Act was not passed by the Commission until March 4, 1941,[20] after respondent's employment ended. This conclusion, however, was foreshadowed by the ruling of the Commission, December 29, 1937[21] that it would limit regulations concerning maximum hours to employees whose functions affected the safety of operations. Other orders, bulletins and opinions pointing to the final conclusion intervened.[22] These various determinations now make it clear that respondent was subject at all times since the effective date of the Fair Labor Standards Act to its provisions. The Interstate Commerce Commission never had the power to regulate his hours.

Perplexing as petitioner's problem may have been, the difficulty does not warrant shifting the burden to the employee. The wages were specified for him by the statute,[23] and he was no more at fault than the employer. The liquidated damages for failure to pay the minimum wages under sections 6(a) and 7(a) are compensation, not a penalty or punishment by the Government.[24] Cf. *Huntington* v. *Attrill*, 146 U. S. 657, 667, 668, 674, 681; *Cox* v. *Lykes*

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[19] "SEC. 13 . . . (b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; . . ." 52 Stat. 1068; 29 U. S. C. §213(b).

[20] Ex parte MC-2, 28 M. C. C. 125.

[21] Ex parte MC-2, 3 M. C. C. 665, 667.

[22] March 25, 1939, Interpretative Bulletin, Wage & Hour Division No. 9; May 9, 1939, Ex parte MC-28, 13 M. C. C. 481, 488; June 15, 1939, Ex parte MC-C-139, 16 M. C. C. 497; May 27, 1940, United States v. American Trucking Assns., 310 U. S. 534.

[23] Cf. Labor Board v. Electric Vacuum Cleaner Co., No. 588, this Term, slip opinion p. 9.

[24] The Government has collected the cases under the Act upon the point: "One line of cases holds that the 'double damages' do not constitute a penalty incurred under the laws of the United States within the meaning of Sections 24(9) and 256 of the Judicial Code (28 U. S. C. secs. 41(9) and 371). Robertson v. Argus Hosiery Mills, 121 F. (2d) 285, 286 (C. C. A. 6th), certiorari denied, No. 638, present term; Stewart v. Hickman, 36 F. Supp. 861 (W. D. Mo.); Kuligowski v. Hart, 4 Wage Hour Rept. 203 (N. D. Ohio); Wingate v. General Auto Parts Co., 40 F. Supp. 364 (W. D. Mo.); Barron v. F. H. E. Oil Co., 4 Wage Hour Rept. 551 (W. D. Tex.); Hart v. Gregory,

Brothers, 237 N. Y. 376, 143 N. E. 226. The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages. *Atchison, etc. Ry.* v. *Nichols*, 264 U. S. 348, 351; *James-Dickinson Co.* v. *Harry*, 273 U. S. 119. Nor can it be said that the exaction is violative of due process. It is not a threat of criminal proceedings or prohibitive fines, such as have been held beyond legislative power by the authorities cited by petitioner. Even double damages treated as penalties have been upheld as within constitutional power.[25]

Affirmed.

The CHIEF JUSTICE concurs in the result. MR. JUSTICE ROBERTS dissents.

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218 N. C. 184, 10 S. E. (2d) 644; Forsyth v. Central Foundry Co., 240 Ala. 277, 198 So. 706; Graves v. Armstrong Creamery Co., 154 Kans. 365, 118 P. (2d) 613; Emerson v. Mary Lincoln Candies, 173 Misc. 531, affirmed 261 App. Div. 879, affirmed, 287 N. Y. 33, 38 N. E. (2d) 234; Abroe v. Lindsay Bros. Co., 300 N. W. 456 (S. Ct. Minn.); Tapp v. Price-Bass Co., 147 S. W. (2d) 107 (S. Ct. Tenn.); Duke v. Helena-Glendale Ferry Co., 5 Wage Hour Rept. 206 (S. Ct. Ark.); Dennis v. Equitable Equipment Co., decided March 16, 1942 (Ct. App. La.); Adair v. Traco Division, 192 Ga. 59, 14 S. E. 2d 466. . . . The other line of cases holding Section 16(b) to be remedial rather than penal involves determination of the applicable statute of limitations. Collins v. Hancock, 4 Wage Hour Rept. 522 (D. La. Caddo Parish); Tucker v. Hitchcock, No. 370, S. D. Fla., Oct. 2, 1941; Klotz v. Ippolito, 40 F. Supp. 422 (S. D. Texas)."

[25] Cf. Missouri Pacific Ry. Co. v. Humes, 115 U. S. 512; Minneapolis & St. Louis Ry. Co. v. Beckwith, 129 U. S. 26; Kansas City Southern Ry. Co. v. Anderson, 233 U. S. 325.

A true copy.

Test:

Clerk, Supreme Court, U. S.